

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS-AMERICAN WATER COMPANY)	
)	
)	Docket No. 02-0690
Proposed General Increase)	
In Water and Sewer Rates)	

MOTION TO STRIKE

NOW COMES THE CITY OF LINCOLN by and through their attorney's Troy A. Fodor and E.M. Fulton Jr., and moves to strike a portion of the Reply Brief on Exceptions of Illinois-American Water Company, and in support of the motion states as follows.

On page 31 of IAWC's Reply Brief on Exceptions, IAWC says, for the first time, "Lincoln presented no witness to say merger savings were not passed on to ratepayers, or how much merger savings really were." This is not true since Lincoln asked IAWC for that information and IAWC replied on the stand and in response to data requests that they did not know, and that zero savings had been passed on to rate payers. This data request was admitted into evidence as Lincoln Cross Exhibit 2, a copy of which is attached as Appendix A. In the merger care, IAWC said the merger savings would be passed on to Lincoln ratepayers when the new rates go into effect. In their Reply Brief on Exceptions, IAWC said merger savings can only be reflected in rates and this is the first case to change Lincoln rates since the merger with United Water-Illinois. (See IAWC Reply Brief on Exceptions, p. 31 lines 20 through 22). The quoted portion of IAWC's Brief on Exception should be stricken because IAWC was in sole possession of the information and either refused or was unable to produce it.

As to the question of how much merger savings there were, Company witness Stafford stated that the Company did not perform a separate analysis to assess the actual amount of test year savings allocable to the customers in the Lincoln District (Tr. 135), and he was not able to identify the amount of merger savings that were allocated to the Lincoln District ratepayers (Tr. 136). IAWC was also required by the Order in Docket 99-0457 not to include any merger costs or the merger premium in rate calculations. When asked about the matter on the stand, Company witness Stafford did not know the amount of the merger costs that were allocated to the shareholders, although he has some recollection that some “amount of [merger cost] was included in the proceeding in this docket.” Finally, he admitted that the Company did not track the dollar amount that went to the shareholders or the dollar amount that went to the ratepayers. (Tr.136). Thus, we are left with the estimated savings in 99-0457, at page 7 and the Commission is urged to use those estimates since they are the best evidence of record. Those estimated amounts are in the record. Mr. Stafford testified as follows:

- Q. I want to talk to you a little bit about merger savings. We asked you a data request about this and it involves the merger of Illinois-American Water Company and United Waterworks Illinois in Lincoln?
- A. Correct.
- Q. And as a result of that merger there was supposed to be some merger savings, is that correct?
- A. Yes
- Q. And were those estimated in that order in that docket?
- A. They were estimated in the docket.
- Q. Would you read that highlighted part from the docket, the Order in that docket?
- A. This is at page 7 of the Order in Docket 99-0457. “IAWC estimates that merger savings for the first ten years following the merger will be \$3,907,678. That exhibit indicates that merger savings are expected to increase year to year from (Tr. 134) \$345,063 in year one to \$422,523 in year ten. IAWC further estimates that merger savings for the first 15 years following the merger will be \$6,313,121.
- Q. Thank you, Mr. Stafford. And we asked you in the data request to tell us how the merger savings were allocated and you were not exactly able to tell us that, were you?
- A. I had indicated in the response the basic background of the savings and, that’s correct, I did not directly address the allocation. I did say that we had not performed a separate

analysis to assess the actual amount of test year savings who were Lincoln's allocable share of such savings.

- Q. If you would look at another place here in the Order, on page 16, would you read the highlighted part of that order?
- A. "All merger savings included in data for the rate case test year should be reflected in rates and thereby allocated to ratepayers, and no amount of merger cost will be reflected in rates. The entire balance of merger costs will be allocated to the shareholder." (Tr. 135)
- Q. So you weren't able to tell us in dollars how much of the merger savings were allocated to the Lincoln district ratepayers, were you?
- A. Not in the rate case test year, no.
- Q. Can you tell us now how much merger costs in dollars has Illinois-American allocated to the shareholders?
- A. I don't know the exact dollar amount. I know the amount that was included in the proceeding in this docket. I do not have—
- Q. That was an estimated amount?
- A. Right. That's the only number I know at this time.
- Q. So what you are saying is you didn't track the dollar amount that went to the shareholders and you didn't track the dollar amount that went to the ratepayers, is that correct?
- A. That's correct. (Tr. 136)

Moreover, as stated above Mr. Stafford prepared answers to data requests consistent with the above remarks, and said data request response is in the record. (Lincoln Cross Exhibit 2, Appendix A).

There is a well known legal maxim that says when a party fails to answer a question where the facts are exclusively in the party's possession, then it is presumed the answer is contrary to the interests of the party. 29 Am. Jur.2d, Evidence, Secs. 178,188; 18 ILP, Evidence, Sec. 137; Bell v. McDonald 308 Ill. 329,. 339. Life and Fire Ins. Co. v. Mechanics Fire Ins. Co., 7 Wend 31; Rector v. Rector, 8 Gilm. 120.

As noted above, the merger savings for Lincoln were estimated to be substantial: "IAWC estimates that merger savings for the first ten years following the merger will be \$3,907,678. That exhibit indicates that merger savings are expected to increase year to year, from \$345,063. in Year 1 to

\$422,523. in Year 10. IAWC further estimates that merger savings for the first 15 years following the merger will be \$6,313,121.” (Docket 99-0457, Order p.7) (Tr134-135). Thus, over the last 3 years IAWC has been able to accrue to its shareholders, rather than to its ratepayers, in excess of \$1,000,000 simply by not including Lincoln in a rate case¹. In view of the above cited maxim, the Commission should presume the answers to the questions on merger savings were contrary to IAWC’s interests and accept and use the secondary numbers of record (Tr. 134- 135) and in Docket 99-0457 at page 7 since that is the best evidence.²

Wherefore the City of Lincoln respectfully requests that the portion of IAWC’s Reply to Exceptions on page 31, lines 19 through 20 be stricken and not considered by the Commission.

Respectfully Submitted

Troy A. Fodor
E.M. Fulton Jr.

¹ It should be noted that the Commission in 99-0457 departed from its usual practice to pass on merger savings at the earliest opportunity. Instead, based on a stipulation between Staff and IAWC and without Lincoln’s consent, it departed from its usual practice and required the merger savings to be given to rate payers in IAWC’s next rate case. But IAWC’s next rate case excluded Lincoln. See Order in Docket 00-0340, p.4.

² Sutherland, J said in *Life and Fire Ins. Co. v. Mechanics’ Fire ins. Co.* 7 Wend. 31: “I do not understand the rule to be, that a party has a right to infer, from the refusal of his adversary to produce books or papers which may have been called for, that if produced they would establish the fact which he alleges they would prove. The rule is this: the party in such a case may give secondary or parol proof of the contents of such books or papers, if they are shown or admitted to be in the possession of the opposite party; and if such secondary evidence is imperfect, vague and uncertain as to dates, sums, boundaries, etc., every intendment and presumption shall be against the party who might remove all doubt by producing the higher evidence.” The rule thus stated is quoted with approval by the Supreme Court in *Rector v. Rector*, 8 Gilm. 120 *Carter v Troy Lumber Co.* (1891) 138 Ill. 533, 538, 28 N.E. 932

CERTIFICATE OF SERVICE

02-0690

The undersigned, E.M. Fulton Jr., and Troy A. Fodor hereby certifies that on the 28th day of July, 2003 he served a copy of the foregoing instrument by personally delivering a copy thereof and or mailing a copy thereof by electronic mail and/or United States Mail, postage prepaid, at Springfield, Illinois to the individuals named on the attached Service List in envelopes plainly addressed to each of them.

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